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In the Supreme Court of the United States

No. 77-1134

UNITED STATES OF AMERICA,
Appellee,

vs.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W. A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,
Appellants.

Brief of the State of California as Amicus Curiae

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INTEREST OF AMICUS CURIAE

The State of California shares a common concern with the State of Montana that federal decisional law impacting upon the rights of the several states to impose state taxes of various types upon persons dealing with the federal government be consistent and workable. While California does not have a state statute comparable to the Montana Contractors' Gross Receipts Tax (Chapter 35, Title 84,

Revised Codes of Montana (1947)) before the Court in this case, it does impose various forms of state taxation upon persons dealing with governmental entities. The language of the opinion below, if interpreted to be of general application, could in theory be regarded as inconsistent with the imposition of any state taxes on persons dealing with the federal government. Such an application of this language would be at odds with the settled principles laid down by this court and could encourage needless litigation.

This brief being filed by the State of California Attorney General, consent to its filing is not required. United States Supreme Court Rule 42(4).

OPINION BELOW

The opinion of the three-judge district court for the District of Montana, Helena Division, is reported below at 437 F.Supp. 354 (1977).

ARGUMENT

The Court below held that the Montana Contractors' Gross Receipts Tax levied upon independent contractors performing work for the State of Montana, its subdivisions and the United States government violated the Supremacy Clause, noting that the tax discriminated against the federal government vis a vis the Montana State government insofar as Montana received as general revenue the tax collected after allowing refunds and credits whereas the federal government did not. The Court thus reasoned:

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G. R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G. R. Tax as a line item in his bid and thus increase

> the cost of construction, the State would receive as general revenue that portion of the G. R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50% of the G. R. Tax. Contra, the government is required to pay through increased bids by the imposition of the G. R. Tax and gets no return of the overplus of approximately 50%."

In support of its finding, the district court relied upon *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 384 (1960) as cited in *Homestake-Sapin Partners v. United States*, 375 F.2d 507 (10th Cir. 1967), in support of the proposition that because the tax levied on contractors performing public work generated tax revenue for the state and not the federal government, the federal government was discriminated against. The District Court clearly misread and misapplied the *Phillips Chemical* rule and tested for equality of economic tax impact at the level of the sovereigns rather than at the level of those who deal with the sovereigns, i.e., the contractors. This position is directly contrary to the previously established law in this area.

Beginning with the case of *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), this Court upheld as being constitutional, a "2 percent" tax imposed by a state upon the gross receipts of a contractor earned under with the federal government. See also *Silas Mason Co. v. Tax Commission of Washington*, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187 (1937), upholding the validity of an occupation tax applied to gross income received by individuals performing work for the federal government; *United States v. Boyd*, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed. 2d 713 (1964), upholding a tax levied by the state of Tennessee on property owned by the federal government, but

used by independent contractors in the performance of federal contracts; *Alabama v. King and Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941) upholding the validity of a sales tax levied upon contractors operating under a "cost plus fixed fee" contract with the federal government; *United States v. Detroit*, 355 U.S. 466, 78 S.Ct. 474, L.Ed.2d 424 (1958) upholding the validity of a state tax levied on property owned by the federal government but leased to an independent contractor.

> "At the same time it is well settled that the government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the government." *Detroit, supra*, p. 469.

The cases made it clear for a tax to be valid, it must (i) not have substantial economic impact on the federal government; (ii) not be levied directly on the federal government; and (iii) not be discriminatory. A review of the tax levied by the State of Montana indicates that it falls within these guidelines. It is a tax one-fourth as large as the tax levied in *Dravo* (½ of 1 percent as opposed to 2 percent); it is not direct, it is levied upon all contractors performing work for any public body—including the State of Montana and its subdivisions.[1]

The defect of the language of the majority opinion below was aptly described in the dissent of Judge Kilkenny as follows:

> "The reasoning of the majority *sub silentio* overrules this (Dravo) and other authority. In each of the

1. Compare the discrimination condemned in the *Phillips Chemical* case, where property leased from the federal government was taxed at full value whereas similar leases of state owned property was not taxed at all. 361 U.S. at 387.

> above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal government because the otherwise legitimately collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of discrimination against the federal government, *any state tax could be traced backwards to defeat its own existence.*" (Emphasis added)

CONCLUSION

In light of the foregoing, it is respectfully requested that this Court note probable jurisdiction in the present case to remove the ambiguity contained in the language of the opinion below and consider all other issues raised in Appellants' Jurisdictional Statement.

Dated: March 14, 1975

Respectfully submitted,

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